

**Government of the State of Penang v Minister of Home Affairs
& Ors**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
P-01(A)-480–12 OF 2016
TENGKU MAIMUN, KAMARDIN HASHIM AND MARY LIM JJCA
28 APRIL 2017

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Constitutional Law — Executive — Prerogative — Home Minister issued order ('impugned order') declaring voluntary anti-crime patrol force ('PPS') formed by Penang State Government to be an unlawful society that was carrying out activities prejudicial to public order — High Court dismissed judicial review application to quash impugned order holding PPS to be an unregistered society which Minister had unfettered discretion under s 5(1) of the Societies Act 1966 to declare unlawful — Whether PPS not a society but a lawfully created organ of state government pursuant to powers conferred upon it under Local Government Act 1976 and/or the Federal Constitution — Whether impugned order unreasonable, irrational, arbitrary and vague as no evidence was given to show in what way PPS' activities prejudicial to public order — Whether High Court wrong to hold Minister absolute unquestionable discretion to make impugned order — Whether test to be applied in judicial review applications was objective test that allowed court to review substance of Minister's decision

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In May 2011, the State Executive Council of the appellant approved the creation of neighbourhood voluntary anti-crime patrol units ('PPS') to enhance public safety and security. Membership in the PPS, which was funded by the state government, was open to interested individuals aged 18 years and above who were of good health and character and did not have any past criminal record. While on duty, members of the PPS were required to wear a special uniform, complete with boots, vest and a cap with the PPS logo, carry a PPS identification card as well as a whistle, walkie-talkie and torchlight. They were given training by the police and the fire department, taught how to carry out first aid and other emergency techniques, including cardiopulmonary resuscitation ('CPR'), and on how best to deal with natural disasters. In August 2014, when the PPS was 9,000 members-strong, a member of the public lodged a police report claiming that he was assaulted by a group of PPS members. Two members of the PPS lodged a counter police report stating that they were the only ones who were involved. The two PPS members were subsequently charged in court for committing affray under s 160 of the Penal Code but were discharged on the application of the public prosecutor. However, that incident caused certain politicians to call for the PPS to be banned and for the second respondent ('R2') to warn the PPS to cease all its activities. Following that warning, police arrested several members of the PPS

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- A under s 43 of the Societies Act 1966 ('the Societies Act'). The arrests were followed by an order ('the impugned order') issued by the first respondent ('R1') pursuant to s 5(1) of the Societies Act declaring the PPS to be an unlawful society. R1 claimed PPS was 'being used for purposes prejudicial to public order'. The appellant applied to the High Court for judicial review to quash the impugned order and to declare that PPS was a lawfully established organ of the appellant and not a society under the Societies Act. The High Court dismissed the application holding that PPS did fall within the definition of society under the Societies Act and was unlawful because it was unregistered and that it had carried out activities that had usurped the functions of the police force. The court held that under s 5(1) of the Societies Act, R1 had absolute discretion to make the impugned order and that the order was properly made after relevant facts were taken into account. In the instant appeal against the High Court's decision, the appellant reiterated that it was not a society under the Societies Act but a lawfully established organ of the appellant; that the impugned order was wrong and unjustified because R1 did not provide any evidence to show PPS had caused public disorder.
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Held, allowing the appeal and setting aside the decision of the High Court:

- E (1) This court found that PPS was a machinery of the appellant lawfully established pursuant to the powers conferred upon it by the Local Government Act 1976 and/or the Federal Constitution. As such, the impugned order which presupposed that PPS was a society under the Societies Act could not stand in law (see para 43).
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- G (2) The High Court erred in failing to consider the appellant's position vis a vis the Federal Constitution. Pursuant to art 80, the appellant clearly had the power to issue executive orders in respect of matters under the State List. It could not be denied that PPS was formed pursuant to the executive and administrative powers of the state government vide MMK Bil 16/2011 to provide 'local government services' to the state. Local government fell under the State List and the decision of the Majlis Mesyuarat Kerajaan was a policy decision well within the scope and responsibility of the appellant. It was evident from the first respondent's affidavit that even the respondents had no quarrel with the fact that PPS was established by the state government to provide services to the state. That necessarily inferred that PPS probably existed as an unincorporated sole or association (see para 42).
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- I (3) Given the fact that between 2011–2014, the Royal Malaysian Police and other government agencies were visibly engaged in various meetings and activities of PPS, and given the absence of any other evidence to show that PPS had carried out activities prejudicial to public order, this court

found that the impugned order was unreasonable and irrational and was not made according to rules of reason and justice but was arbitrary and vague (see para 62).

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- (4) Contrary to the finding of the High Court, there were no facts or evidence in the first respondent's affidavit to support his decision to declare PPS unlawful on the ground that PPS was being used for purposes prejudicial to public order. There were no particulars to substantiate the first respondent's averments in his affidavit. There was absolutely nothing to show what happened between 2011–2014 that turned PPS from doing something lawful to doing something prejudicial to public order. Bereft of any evidence relating to 'purposes prejudicial to public order' the first respondent's decision was without basis and his reliance on his understanding of his powers under s 5(1) of the Societies Act was erroneous and misplaced (see paras 55 & 61).

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- (5) The High Court erred in holding that s 5 of the Societies Act gave the first respondent unfettered discretion to declare PPS unlawful and that the court could not go behind that decision and substitute it with its own decision. It was trite that the test that was applicable in judicial review proceedings was the objective test where the court could consider the substance of the Minister's decision (see paras 49 & 52).

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[Bahasa Malaysia summary]

Pada Mei 2011, Majlis Mesyuarat Kerajaan negeri perayu telah meluluskan pembentukan unit-unit peronda anti-jenayah sukarela kejiranan ('PPS') untuk menambah baik keselamatan dan ketenteraman awam. Keahlian dalam PPS, yang dibiayai oleh kerajaan negeri, adalah terbuka kepada individu-individu yang berminat berumur 18 tahun dan ke atas dengan kesihatan serta sikap yang sihat dan tidak mempunyai apa-apa rekod jenayah silam. Semasa bertugas, ahli-ahli PPS dikehendaki memakai baju seragam yang khas, lengkap dengan kasut but, jaket dan topi dengan logo PPS, membawa kad pengenalan PPS dan juga wisel, walkie-talkie dan lampu suluh. Mereka diberikan latihan oleh polis dan jabatan bomba, diajar bagaimana melakukan pertolongan kecemasan dan teknik kecemasan lain, termasuk bantuan pernafasan ('CPR'), dan tentang cara terbaik untuk mengendalikan bencana lam. Pada Ogos 2014, apabila PPS mempunyai 9,000 ahli, seorang awam telah membuat laporan polis mendakwa bahawa dia telah diserang oleh sekumpulan ahli PPS. Dua ahli PPS telah membuat laporan polis balas menyatakan bahawa hanya mereka yang terlibat. Dua ahli PPS itu kemudian telah dituduh di mahkamah kerana melakukan kekeliruan di bawah s 160 Kanun Keseksaan tetapi dilepaskan atas permohonan pendakwa raya. Walau bagaimanapun, kejadian tersebut telah menyebabkan ahli politik tertentu meminta agar PPS diharamkan dan untuk responden kedua ('R2') memberi amaran agar PPS menghentikan kesemua kegiatannya. Berikutan amaran itu, polis telah menangkap beberapa ahli PPS di bawah s 43 Akta Persatuan 1966 ('Akta Persatuan tersebut'). Tangkapan

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- A tersebut diikuti dengan satu perintah ('perintah yang dipersoalkan') yang dikeluarkan oleh responden pertama ('R1') menurut s 5(1) Akta Persatuan tersebut mengisytiharkan PPS sebagai satu persatuan yang menyalahi undang-undang. R1 mendakwa PPS adalah 'being used for purposes prejudicial to public order'. Perayu telah memohon kepada Mahkamah Tinggi
- B untuk semakah kehakiman bagi membatalkan perintah yang dipersoalkan itu dan untuk mengisytiharkan bahawa PPS adalah organ yang ditubuhkan secara sah oleh perayu dan bukan persatuan di bawah Akta Persatuan tersebut. Mahkamah Tinggi telah menolak permohonan itu dengan memutuskan bahawa PPS tidak terjatuh dalam takrif persatuan di bawah Akta Persatuan
- C tersebut dan telah menyalahi undang-undang kerana ia tidak didaftarkan dan bahawa ia telah menjalankan kegiatannya yang merampas fungsi anggota polis. Mahkamah memutuskan bahawa di bawah s 5(1) Akta Persatuan tersebut, R1 mempunyai budi bicara mutlak untuk membuat perintah yang dipersoalkan
- D itu dan bahawa perintah itu telah dibuat sewajarnya selepas fakta yang berkaitan telah diambil kira. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu mengulangi bahawa ia bukan suatu persatuan di bawah Akta Persatuan tersebut tetapi suatu organ yang ditubuhkan secara sah oleh perayu; bahawa perintah yang dipersoalkan adalah salah dan tidak wajar kerana R1 tidak mengemukakan apa-apa keterangan untuk menunjukkan PPS telah
- E menyebabkan gangguan awam.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

- F (1) Mahkamah ini mendapati bahawa PPS adalah jentera perayu yang ditubuhkan secara sah menurut kuasa yang diberikan kepadanya oleh Akta Kerajaan Tempatan 1976 dan/atau Perlembagaan Persekutuan. Oleh itu, perintah yang dipersoalkan yang mengandaikan bahawa PPS
- G adalah suatu persatuan di bawah Akta Persatuan tersebut tidak boleh kekal dari segi undang-undang (lihat perenggan 43).
- H (2) Mahkamah Tinggi terkhilaf kerana gagal mengambil kira kedudukan perayu berkaitan Perlembagaan Persekutuan. Menurut perkara 80, perayu jelas mempunyai kuasa untuk mengeluarkan perintah eksekutif berkaitan perkara-perkara di bawah Senarai Negeri. Ia tidak boleh dinafikan bahawa PPS ditubuhkan menurut kuasa eksekutif dan pentadbiran kerajaan negeri melalui MMK Bil 16/2011 untuk memberikan 'local government services' kepada negeri. Kerajaan Tempatan terjatuh di bawah Senarai Negeri dan keputusan Majlis Mesyuarat Kerajaan adalah keputusan polisi yang terjatuh dalam skop dan tanggungjawab perayu. Ia adalah jelas daripada affidavit responden pertama bahawa meskipun responden tiada masalah dengan fakta bahawa PPS telah ditubuhkan oleh kerajaan negeri untuk memberikan perkhidmatan kepada negeri. Ia semestinya disimpulkan bahawa PPS
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- mungkin wujud sebagai persatuan tunggal atau tidak diperbadankan (lihat perenggan 42). A
- (3) Berdasarkan fakta bahawa antara 2011–2014, Polis Di Raja Malaysia dan agensi kerajaan lain dengan jelas terlibat dalam pelbagai mesyuarat dan kegiatan PPS, dan berdasarkan ketiadaan apa-apa keterangan lain untuk menunjukkan bahawa PPS telah menjalankan kegiatan yang memudaratkan ketenteraman awam, mahkamah ini mendapati bahawa perintah yang dipersoalkan itu adalah tidak munasabah dan tidak rasional dan tidak dibuat menurut rukun sebab dan keadilan tetapi adalah sewenang-wenangnya dan tidak jelas (lihat perenggan 62). B
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- (4) Bertentangan dengan penemuan Mahkamah Tinggi, tiada fakta atau keterangan dalam affidavit responden pertama untuk menyokong keputusannya bagi mengisytiharkan PPS menyalahi undang-undang atas alasan bahawa PPS digunakan bagi tujuan memudaratkan ketenteraman awam. Tiada butiran untuk mengukuhkan penegasan responden pertama dalam affidavitnya. Tiada apa langsung yang menunjukkan apa yang berlaku antara 2011–2014 yang membuatkan PPS melakukan sesuatu yang sah kepada suatu yang memudaratkan ketenteraman awam. Tanpa apa-apa keterangan berkaitan ‘purposes prejudicial to public order’ keputusan responden pertama tidak mempunyai asas dan kebergantungannya kepada kefahamannya berhubung kuasanya di bawah s 5(1) Akta Persatuan tersebut adalah salah dan tidak kena pada tempatnya (lihat perenggan 55 & 61). D
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- (5) Mahkamah Tinggi terkhilaf dalam memutuskan bahawa s 5 Akta Persatuan tersebut memberikan responden pertama budi bicara yang tidak terbatas untuk mengisytiharkan PPS menyalahi undang-undang dan bahawa mahkamah tidak boleh berbalik kepada keputusan tersebut dan menggantikannya dengan keputusannya sendiri. Ia adalah lapuk bahawa ujian yang boleh terpakai dalam prosiding semakan kehakiman adalah ujian objektif di mana mahkamah boleh mempertimbangkan substans keputusan Menteri (lihat perenggan 49 & 52).] F
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Notes

For a case on prerogative, see 3(2) *Mallal's Digest* (5th Ed, 2015) para 2614. H

Cases referred to

- Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307, FC (refd) I
- Dato' Ambiga Sreenivasan & Ors v Menteri Dalam Negeri & Ors* [2012] MLJU 710; [2012] 7 CLJ 43, HC (refd)
- Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia)* [2012] 6 MLJ 340, CA (refd)

- A** *MKini Dotcom Sdn Bhd v Ketua Setiausaha Dalam Negeri & 2 Ors* [2013] 6 AMR 668 (refd)
Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243, FC (refd)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449, FC (refd)
- B** *Nordin Hj Zakaria (Timbalan Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] 2 CLJ 777, FC (not folld)
Pendaftar Pertubuhan v Datuk Justin Jingga [2013] 3 MLJ 16, FC (not folld)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (folld)
- C** *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and Another Appeal* [2014] MLJU 1874; [2015] 2 CLJ 328, CA (folld)
Susannah Sharp v Wakefield and others [1891] AC 173, HL (refd)
Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765, FC (refd)
- D**

Legislation referred to

- Federal Constitution arts 74, 80, Ninth Schedule, List II, State List, Items 4, 7
- E** Local Government Act 1976 ss 2, 9, 13, 101(v)
 Penal Code s 160
 Societies Act 1966 ss 2, 5, 5(1), 43
- Tommy Thomas (Ambiga Sreenevasan and Ganesan Nethi with him) (Tommy Thomas) for the appellant.*
- F** *Shamsul bin Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the respondents.*

Tengku Maimun JCA (delivering judgment of the court):

- G** [1] This was an appeal by the State Government of Penang ('the state government') against the decision of the High Court in dismissing its application for judicial review.
- H** [2] We heard the appeal and had unanimously allowed it. We now give our reasons.

BACKGROUND FACTS

- I** [3] The state government, at its executive council meeting ('Majlis Mesyuarat Kerajaan') on 27 April 2011 proposed the establishment of Pasukan Peronda Sukarela Pulau Pinang ('PPS'). PPS was to contribute to the safe, secure and conducive environment for Penang residents in their respective neighbourhoods. Members of PPS are volunteers and their role was not to carry

out enforcement activities but to complement the police. The proposal was approved by the Majlis Mesyuarat Kerajaan ('MMK') on 4 May 2011.

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[4] On 14 September 2011 the Polis Diraja Malaysia ('PDRM') was informed of the state government's decision to establish PPS. On 17 September 2011, PPS was officially launched by the Chief Minister where PPS units were formed in neighbourhoods within a state assembly constituency ('KADUN') under the purview of the respective state assemblyman ('ADUN').

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[5] There are four levels of administration and management of PPS, namely:

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(a) state: chaired by a member of the state executive council responsible for welfare, caring society and environment. The committee members include state assemblymen, the units and government agencies such as the district office and the economy planning unit ('UPEN');

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(b) district: chaired by the respective district officers. The committee members include state assemblymen under the respective districts;

(c) KADUN: chaired by the respective ADUN. The committee members include the patrol leader, the deputy and the assistant patrol leader of the PPS Unit in that state assembly constituency and the chairman of the village security and development committee ('JKKK'); and

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(d) unit: chaired by the PPS patrol leader who is assisted by the deputy unit leader and the assistant patrol leader. the committee comprises the unit members who are at least 15 in number.

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[6] PPS is funded by the annual allocations received from the state government which is annually allocated to each KADUN as follows:

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(a) one PPS unit: RM10,000;

(b) two PPS units: RM20,000; and

(c) three and more PPS units: RM30,000.

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[7] The allocation received by each KADUN is controlled by their respective ADUN and it is used for the management of the PPS unit(s) in his constituency.

[8] The membership of PPS is open to interested individuals, subject to the following criteria:

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(a) 18 years old and above;

(b) of sound mind;

- A (c) of good character;
- (d) no criminal record;
- (e) healthy and active;
- B (f) not involved in negative social activities; and
- (g) disciplined and ready to follow orders.

C [9] Since its formation in 2011, members of PPS whose names were to be submitted to PDRM for vetting (exh PBP7 at *rekod rayuan Jld 2 Bhgn C*: at p 233) received training from various agencies, including but not limited to PDRM, Persatuan BOMBA Sukarela and other private bodies. Courses provided to PPS members which were conducted in their respective KADUNs and districts include medical aid and emergency; cardiopulmonary resuscitation (CPR); handling emergencies, in particular techniques on bandaging wounds and bone fracture treatment and treatment of bites and stings of insects and other venomous animals.

E [10] Members also attended compulsory courses on natural disasters and emergency briefings on flash floods, hurricanes, fires and accidents; briefings on PPS standard operating procedure; information pertaining to important government agencies and the methods of data entry in PPS log books for emergencies and submission of reports to ADUN.

F [11] Meetings and briefings of PPS were attended by representatives of PDRM who had supported the activities of PPS (exhs PBP3 and PBP6 at *rekod rayuan Jld 2 Bhgn C*: at pp 205, 209, 212, 214 and 215). In fact, at one of the PPS meetings, the representative from PDRM gave the following suggestion (exh PBP16 at *rekod rayuan Jld 2 Bhgn C*: at p 336):

G Wakil PDRM memaklumkan juga bahawa ahli PPS perlu didedahkan dengan undang-undang dalam menjalankan tugas.

H [12] The state government provides members with uniform, boot, vest and cap bearing the PPS logo which must be worn when members are on duty. Members are also required to have their identity card and appointment certificate and to carry tools such as a whistle, walkie-talkie and a torch light whilst patrolling. Members do not carry any weapon. Patrolling and other duties of PPS must be recorded in a log book in the format provided by the state government. In some neighbourhoods, the log book is taken to the police station and validated by PDRM with their stamp and signature. Patrol leaders are responsible in ensuring that all activities are recorded and the log book produced to their respective ADUNs on a monthly basis. Should there be any incident, a separate incident report in a prescribed form must be completed

which will be attended to by PDRM (exh PBP13 at *rekod rayuan Jld 2 Bhgn C* at p 308). A

[13] As at 31 August 2014, there were 299 PPS units with 9,002 members.

EVENTS LEADING TO THE IMPUGNED ORDER B

[14] One Ong Eu Soon alleged that on 17 August 2014 at about 11pm, he was assaulted by a group of PPS members in front of the Bandar Baru Air Itam market. He lodged a police report on the incident. Two PPS members also lodged police reports claiming that the altercation only involved the two of them and not a group of PPS members and that Ong Eu Soon was the aggressor (exhs PBP17, 18, 19 at *Rekod Rayuan Jld 2 Bhgn C*: at pp 337–339). C

[15] As reported in the *STAR* newspaper dated 26 August 2014, the Malaysian Chinese Association (MCA) then called for the PPS to be banned (exh PBP20 at *Rekod Rayuan Jld 2 Bhgn C*: at p 340). D

[16] On 29 August 2014, the Inspector General of Police ('the second respondent') issued a warning to PPS to cease all activities as PPS had been deemed illegal. E

[17] On 31 August 2014, PPS members took part in the Merdeka Day celebration at the state level (as what they had been doing since 2011). At the end of the parade, 154 members were arrested under s 43 of the Societies Act 1966 ('the Societies Act') and membership cards as well as other items belonging to the members were seized. F

[18] On 3 November 2014, the Minister of Home Affairs ('the first respondent') issued an order pursuant to s 5(1) of the Societies Act 1966 declaring that PPS is an unlawful society on the ground that PPS 'is being used for purposes prejudicial to public order' (exh AZH1 at *rekod rayuan Jld 2 Bhgn C*: at p 424). G

THE JUDICIAL REVIEW APPLICATION H

[19] The state government ('the appellant') applied and obtained leave from the High Court to file a judicial review application seeking among others for a declaration that PPS was lawfully and properly established by the appellant; a declaration that PPS is not a society within the meaning of the Societies Act 1966 and an order of certiorari to quash the order dated 3 November 2014 ('the impugned order'). I

A [20] The grounds relied upon by the appellant to quash the impugned order may be summarised as follows:

- (a) PPS was established by the appellant under s 101(v) of the Local Government Act 1976 ('the Local Government Act');
- B (b) PPS is not a society as defined in the Societies Act;
- (c) PPS is a mechanism by the appellant to complement the police and other government and law enforcement agencies; and
- C (d) PPS was not given an opportunity to make representations before the impugned order was issued.

D [21] The judicial review application was dismissed by the High Court where the learned judge stated among others that (*rekod rayuan Jld 1 Bhgn A and B*: at p 107):

E Based on the 1st respondent's affidavit in reply, I find the 1st respondent had taken into consideration relevant facts before he made the impugned order. Section 5(1) of the Societies Act gives the 1st respondent an absolute discretion to make the order. The decision is his solely. This court cannot substitute its own decision to that of the 1st respondent. On the facts, the 1st respondent's decision is not perverse.

[22] Her Ladyship held that the appellant failed to challenge the impugned order on all the four grounds raised where she found as follows:

- F (a) on the first ground, the appellant does not fall within the definition of 'local authority' as defined under s 2 or a corporation under s 13 of the Local Government Act 1976 ('the Local Government Act'). Thus the appellant cannot claim that they have the power to form PPS under s 101(v) of the Local Government Act when the Local Government Act does not give them such power;
- G (b) on the second ground, PPS is an association of persons of more than 9,000 members. Section 2 of the Societies Act defined 'society' as 'association of seven persons or more'. Applying the definition section, PPS falls within the description of 'association of seven persons or more'.
- H Therefore PPS is a society as defined under s 2 of the Societies Act;
- (c) on the third ground, although PPS was in existence for three years without any problem, there was evidence that PPS members had been carrying out activities that assumed the jurisdiction and duties of the police without obtaining approval from the Registrar of Societies. Not only is PPS a non-registered society, it has also carried out activities in contravention of the Act. Therefore it is not correct for PPS to say they complement PDRM; and
- I (d) s 5(1) of the Societies Act did not impose any duty on the first

respondent to hear evidence from the appellant. Therefore, the appellant cannot ask for a right which does not exist.

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[23] The application for judicial review was thus dismissed, hence the appeal.

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THE APPEAL

[24] At the outset, learned counsel for the appellant highlighted that in considering s 101(v) of the Local Government Act, the learned judge had overlooked the fact that the appellant did not pursue the application premised on s 101(v) of the Local Government Act. Prayer (1) of the application which was originally worded 'A Declaration that Pasukan Peronda Sukarela ('PPS') was lawfully and properly established by the Applicant pursuant to s 101(v) of the Local Government Act 1976' had been amended by deleting the words 'pursuant to s 101(v) of the Local Government Act'. That being the case, we noted that whether or not PPS was lawfully and properly established pursuant to s 101(v) of the Local Government Act did not require determination by the court.

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[25] In submitting that the judicial review application ought to have been allowed by the High Court, learned counsel for the appellant canvassed the following grounds:

- (a) PPS is not a society within the meaning of the Societies Act which is subject to the jurisdiction of the first respondent but is an organ of the state government;
- (b) the impugned order was ultra vires the Societies Act and unreasonable in the circumstances of the case and perverse and devoid of plausible justification because the reasons given by the first respondent do not in any way show a reasonable nexus between PPS and public disorder; and
- (c) the first respondent made the impugned order without giving any opportunity to the appellant to be heard.

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[26] In respect of the first ground, learned counsel relied on arts 74 and 80 of the Federal Constitution which provide for the subject matter of the federal and state laws and the distribution of the executive powers, respectively. Reference was also made to the Ninth Schedule of the Federal Constitution, in particular to items 4 and 7 of List II State List.

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[27] Learned counsel highlighted that PPS was formed through an executive and administrative circular of the state government, namely the MMK Bil 16/2011 and that the evidence showed the following:

- A** (a) PPS was involved in community policing which work has been acknowledged by PDRM and other government agencies;
- (b) PPS has assisted and complements ‘local administration’ and/or ‘local government services’ and/or performed ‘exclusive state services’.

B [28] PPS thus falls within the ambit and scope of the executive authority of the state government vis a vis the Federal Constitution and the Societies Act has no application to PPS.

C [29] As regards the second ground, learned counsel submitted that even if PPS is a society (which the appellant did not concede) the impugned order was ultra vires the Societies Act given that PPS did not pose any threat to public order. On the contrary, the very purpose for the establishment of PPS was to operate as a state government mechanism to complement PDRM and other agencies.

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E [30] In so far as the third ground was concerned, learned counsel for the appellant contended that the impugned order was tainted with procedural impropriety as the first respondent has failed to give an opportunity to the appellant and the persons wishing to make representations on the legality of PPS in a meaningful and proper manner prior to making the impugned order.

F [31] Learned counsel had also taken issue on the judgment of the learned judge where Her Ladyship stated that s 5 of the Societies Act gives the first respondent an unfettered discretion to declare PPS unlawful and that the court cannot go behind the decision and substitute with its own decision.

G [32] For the respondents, learned senior federal counsel (‘SFC’) reiterated that PPS fulfils the definition of a society under the Societies Act and it being unregistered, the first respondent had rightfully declared PPS as unlawful. Learned SFC echoed the learned judge’s finding that the appellant cannot rely on s 101(v) of the Local Government Act to justify the establishment of PPS as the appellant is not a local authority as defined under s 2 of the Local Government Act (as noted earlier, pursuant to an amendment, s 101(v) was not the ground relied upon by the appellant for the judicial review application).

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I [33] Learned SFC also submitted that pursuant to s 5 of the Societies Act, the discretionary power to declare unlawful any society may be exercised by the first respondent according to his satisfaction and that the court must be cautious in reviewing decisions of such nature so as not to fall into the trap of ‘stepping into the shoes of the decision maker’ which will be contrary to established principles of judicial review. In this regard, learned SFC highlighted the first respondent’s affidavit in reply which states ‘... PPS ini adalah sebuah

pertubuhan yang menyalahi undang-undang dan pada masa material sedang digunakan bagi maksud memudaratkan ketenteraman awam’.

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[34] On the appellant’s complaint that it was not given the opportunity to make representation, learned SFC submitted that there was no requirement under s 5 of the Societies Act that the appellant be given the right to be heard.

B

OUR FINDINGS

[35] We begin by stating our agreement with learned counsel for the appellant that the Societies Act does not cover every ‘association of person’. As observed by Rohana J (as Her Ladyship then was) in *Dato’ Ambiga Sreenevasan & Ors v Menteri Dalam Negeri & Ors* [2012] MLJU 710; [2012] 7 CLJ 43 at p 62:

C

The existence of unincorporated associations and other entities existing outside the ambit of the Societies Act and therefore not registered there under, has long been recognised in Malaysia. In this regard, there is clear case law that indicates the existence of such entities both prior and subsequent to the enactment of the Societies Act 1966 (see *SPH De Silva Ltd v Balwant Singh* [1960] 1 MLJ 175, *Tan Eng Hoe v Liang Hooi Kiang* [1961] 1 MLJ 119, *Tharmalingam v Sambathan* [1961] 1 MLJ 63, *Lee Eng Teh & Ors v Teh Thiang Seong & Anor* [1967] 1 MLJ 42 and *Damansara Jaya Sdn Bhd v Penghuni-Penghuni Kuil Munneswaran Alayam atau Kuil Muniandy Kali Alayam* [1994] 1 CLJ 164).

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WHETHER PPS IS A SOCIETY UNDER THE SOCIETIES ACT

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[36] The question then is whether PPS is a society which falls under the Societies Act or is an unincorporated association (or as submitted for the appellant, an organ of the state government) which need not be registered under the Societies Act.

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[37] To appreciate the argument of learned counsel for the appellant that PPS is not a society but an organ or machinery of the State Government, it is necessary to reproduce arts 74 and 80 of the Federal Constitution which read respectively:

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74 Subject matter of Federal and State laws

- (1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
- (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

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- A** 80 Distribution of executive powers
- (1) Subject to the following provisions of this Article the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws.
- B**
- [38] The other provision relied upon by learned counsel was the Ninth Schedule List II State List in particular Items 4 and 7 which read:
- 4 Local government outside the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, including —
- C**
- (a) Local administration; municipal corporations; local, town and rural board and other local authorities; local government services; local rates; local government elections,
- 7 Machinery of the State Government, subject to the Federal List, but including —
- D**
- (a) Civil List and State pensions;
- (b) Exclusive State services;
- (c) Borrowing on the security of the State Consolidated Fund;
- E**
- (d) Loans for State purposes;
- (e) Public debt of the State; and
- (f) Fees in respect of any of the matters included in the State List or dealt with by State law.
- F**
- [39] Learned counsel's emphasis was on 'local government services' in Item 4 and 'Exclusive State services' in Item 7.
- [40] Apart from the above provisions in the Federal Constitution, learned counsel relied on ss 9 and 101(v) of the Local Government Act which provide:
- G** 9 Power of the State Authority to issue directions
- (1) The State Authority may from time to time give the local authority directions of a general character, and not inconsistent with the provisions of this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed on the local authority by or under this Act in relation to matters which appear to the State Authority to affect the interests of the local authority area, and the local authority shall as soon as possible give effect to all such directions.
- H**
- (2) The local authority shall furnish the State Authority with such returns, accounts and other information with respect to the property and activities of the local authority as the State Authority may from time to time require.
- I**

101 Further power of local authority

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In addition to any other powers conferred upon it by this Act or by any other written law a local authority shall have power to do all or any of the following things, namely —

(v) to do all things necessary for or conducive to the public safety, health and convenience.

B

[41] Having regard to the above provisions and to the structure and role of the PPS which was irrefutably confined to the respective KADUN/neighbourhoods, we found much force in the submission of learned counsel for the appellant that PPS is an organ or a machinery of the state government lawfully established pursuant to its powers conferred by the Federal Constitution relating to local government.

C

[42] In our judgment, the learned judge erred in failing to consider the position taken by the appellant vis a vis the Federal Constitution. Pursuant to art 80 the state government clearly has the power to issue executive orders in respect of matters under the State List. It cannot be denied that PPS was formed pursuant to the executive and administrative powers of the state government vide MMK Bil 16/2011 to provide 'local government services' to the state. Local government falls under the State List and the decision of the MMK was a policy decision well within the scope and responsibility of the state government. We noted that even the respondents had no quarrel with the fact that PPS was established by the state government to provide services to the state as evident from the first respondent's affidavit wherein he states that '... pada asalnya pertubuhan PPS adalah untuk melaksanakan melaksanakan (sic) aktiviti-aktiviti sukarela yang berbentuk kemasyarakatan bagi Kerajaan Negeri ...'. This necessarily infers that PPS may properly exist as unincorporated sole or association.

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[43] Hence we agreed with learned counsel for the appellant that PPS is a machinery of the state government lawfully established by the state government pursuant to the powers conferred upon it by the Local Government Act and/or the Federal Constitution. As such, the impugned order which presupposes that PPS is a society under the Societies Act cannot stand in law.

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WHETHER THE FIRST RESPONDENT HAD ACTED REASONABLY OR RATIONALLY IN ISSUING THE IMPUGNED ORDER

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[44] Notwithstanding our finding that PPS is not a society, for completeness we will proceed to consider the arguments made by the parties on whether the decision of the first respondent was amenable to judicial review.

A [45] The first respondent issued the impugned order under s 5(1) of the Societies Act which reads:

5 Power of the Minister to declare a society unlawful

B (1) It shall be lawful for the Minister in his absolute discretion by order to declare unlawful any society or branch or class or description of any societies which in his opinion, is or is being used for purposes prejudicial to or incompatible with the interest of the security of Malaysia or any part thereof, public order or morality.

C [46] The learned High Court judge relied on *Pendaftar Pertubuhan v Datuk Justin Jiggut* [2013] 3 MLJ 16 and *Nordin Hj Zakaria (Timbalan Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] 2 CLJ 777 to find that the first respondent has an unfettered discretion to declare PPS unlawful and that the court cannot go behind his decision and substitute with the court's own decision.

D [47] With respect, we disagreed and we found learned judge's reliance on *Datuk Justin Jiggut* and *Nordin Hj Zakaria* misplaced as those two cases were not concerned with the discretionary powers of the Minister.

E [48] The test to be applied in determining the exercise of the Minister's discretionary power in cases involving national security or activities prejudicial to public order can be found among others, in the following cases which are more relevant and which provide better guidance as regards the issue at hand:

F (a) *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135;

(b) *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243;

G (c) *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449;

(d) *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307;

H (e) *Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) v SIS Forum (Malaysia)* [2012] 6 MLJ 340;

(f) *Dato' Ambiga Sreenevasan & Ors v Menteri Dalam Negeri & Ors*;

I (g) *MKini Dotcom Sdn Bhd v Ketua Setiausaha Dalam Negeri & 2 Ors* [2013] 6 AMR 668;

(h) *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 MLJ 765; and

(i) *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and Another*

Appeal [2014] MLJU 1874; [2015] 2 CLJ 328.

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[49] From the above cases, it is now trite that the test applicable in judicial review is the objective test where the court can consider the substance of the Minister's decision.

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[50] To highlight some of the cases, in *Sri Lempah Enterprise* Raja Azlan Shah Ag CJ (Malaya) (as His Royal Highness then was) said at p 148:

Unfettered discretion is a contradiction in terms. ... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.

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D

[51] In *Sepakat Efektif*, this court through Mohamad Ariff Yusof JCA said at p 352 (CLJ):

Where an exercise of discretion has a constitutional dimension, it is incumbent on the court to examine that exercise more vigilantly, and not rely solely on the *ipse dixit* of the Minister. We have earlier referred to the main lines of case authorities on the approach to be adopted, such as fundamental liberties in the Federal Constitution must be interpreted generously and given a wide meaning, and the courts must read them in a 'prismatic' fashion (*Lee Kwan Woh v PP* [2009] 5 CLJ 631; *Shamim Reza Abdul Samad v PP* [2009] 6 CLJ 93); state action must not be disproportionate to the object it seeks to achieve, and the measures taken must be fair and not arbitrary and should impair the fundamental right in question no more than is necessary to accomplish the legislative or administrative objective (*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507).

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[52] Applying the principles quoted above, we found that the learned judge erred in making the following conclusion (*rekod rayuan Jld 1 Bhgn A and B*: at pp 66–67):

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... in this case, the word used in section 5 is 'absolute discretion'. This means the Minister is given an unfettered discretion to declare PPS unlawful. It is solely his decision. This court cannot go behind the decision and substitute with its own decision.

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[53] And keeping in mind the objective test, we now examine the facts to see whether there is anything to show that PPS is being used for purposes prejudicial to public order.

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[54] The first respondent in his affidavit in reply (*rekod rayuan Jld 1 Bhgn A and B*: at pp 182–183) states as follows:

- A** 14. ... sebelum Perintah bertarikh 3 November 2014 tersebut dikeluarkan saya berpuas hati bahawa PPS ini adalah sebuah pertubuhan yang menyalahi undang-undang dan pada masa material sedang digunakan bagi maksud memudaratkan ketenteraman awam.
- B** 15. Selanjutnya ... saya menyatakan seperti berikut —
- B** (i) PPS adalah pertubuhan yang tidak pernah berdaftar di bawah Akta Pertubuhan 1966;
- C** (ii) terdapat laporan-laporan polis yang dibuat oleh orang awam terhadap PPS yang melaporkan tentang sikap dan tindakan PPS terhadap orang awam yang melibatkan kes pertengkaran dan kes pukul yang menimbulkan suasana keresahan dan ketakutan di kalangan orang awam dan boleh menjejaskan ketenteraman dan keharmonian awam;
- D** (iii) beberapa tangkapan dan siasatan oleh pihak Polis DiRaja Malaysia mendapati ada di kalangan ahli PPS yang mempunyai rekod jenayah/dadah dikehendaki oleh pihak Polis DiRaja Malaysia dan ada yang disahkan sebagai positif dadah;
- E** (iv) PPS didapati menganugerahkan pemakaian pangkat dan darjah untuk jawatan-jawatan yang dilantik bagi menjalankan tugas sebagai seorang penguatkuasa yang mirip kepada seorang anggota dan pegawai polis. Pemakaian pakaian seragam dengan tanda pangkat oleh anggota PPS adalah suatu pelanggaran undang-undang kerana dalam konteks sebuah pertubuhan atau organisasi yang berkonsepkan pakaian seragam selain dari agensi-agensi keselamatan dan penguatkuasa kerajaan, PPS tidak mendapat sebarang kebenaran atau kelulusan Pendaftar Pertubuhan sebagaimana diperuntukkan di bawah Akta Pertubuhan 1966;
- F** (v) PPS didapati melaksanakan aktiviti-aktiviti yang mengambilalih bidangkuasa dan tugas pihak polis atau agensi penguatkuasa lain di mana anggota PPS tidak mempunyai kuasa menahan orang ramai sama ada bagi tujuan pemeriksaan atau pencegahan jenayah semasa melakukan aktiviti
- G** rondaan yang kononnya untuk tujuan mencegah kejadian jenayah.

H [55] Conspicuously absent from the first respondent's affidavit were particulars to substantiate his averments. There was absolutely nothing to show what happened between 2011–2014 which turned PPS from doing something lawful to doing something prejudicial to public order. There was no averment as to the specific activities or purposes undertaken by PPS prejudicial to public order.

I [56] Further, no police reports were exhibited showing the number of 'kes pertengkaran dan kes pukul ...'. The first respondent did not even state the incidents 'yang menimbulkan suasana keresahan dan ketakutan di kalangan orang awam dan boleh menjejaskan ketenteraman dan keharmonian awam'. Neither did the first respondent disclose the number of PPS members said to

have criminal record or being involved in drugs. The first respondent also did not disclose how many of the PPS members who were on the police wanted list.

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[57] The first respondent also has not shown nor particularise the ‘pangkat’ and ‘darjah’ bestowed on the PPS members which are akin to those of PDRM or any other government enforcement agencies which rendered the ‘Pemakaian pakaian seragam dengan tanda pangkat oleh anggota PPS adalah suatu pelanggaran undang-undang ...’.

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[58] We also did not find any particulars to support the first respondent’s averment that ‘PPS didapati mengambilalih bidangkuasa dan tugas pihak polis atau agensi penguatkuasa lain ...’. Nothing was mentioned as to how and what the PPS members did such that they have taken over the jurisdiction and duties of the police or any other enforcement agencies.

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[59] However, as against the bare averments of the first respondent, we have the following evidence on record:

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- (a) Lim Ah Chye a member of the PPS assaulted a reporter. He was fined by the court and expelled from PPS (exh PBP 7 at *rekod rayuan Jld 2 Bhgn C*: at p 243);
- (b) two of PPS members, namely Lee Chan Kwong and Lee Yew Kuan were involved in an altercation with a member of the public Ong Eu Soon. Lee Chan Kwong and Lee Yew Kuan were charged in court under s 160 of the Penal Code for committing affray. They were later discharged upon request of learned DPP (*rekod rayuan Jld 1 Bhgn A and B*: at pp 196–197);
- (c) there were no ranks given to PPS members other than the PPS Chief Unit, Deputy Unit Leader and Vice Unit Leader, all of whom were not identified by any badge of any kind on their uniform (*rekod rayuan Jld 1 Bhgn A and B*: at p 171; exh PBP7 at *rekod rayuan Jld 2 Bhgn C*: at p 247); and
- (d) there was *Panduan Operasi PPS* (exh PBP10 at *rekod rayuan Jld 2 Bhgn C*: at pp 287–288) which states:
 - (i) ‘Borang Insiden (Lampiran C), perlu diisi jika terdapat sebarang insiden yang melibatkan kes polis ...’; and
 - (ii) ‘PPS tidak mempunyai sebarang kuasa khas untuk bertindak sendiri. Walaubagaimanapun, PPS digalakkan membantu sekiranya diperlukan untuk agensi-agensi kerajaan lain seperti Polis (PDRM), Bomba, Jabatan Agama Islam Pulau Pinang (JAIPP), Majlis Agama Islam Pulau Pinang (MAIPP), Jabatan Kesihatan Negeri Pulau Pinang, Jabatan Imigresen, Pihak Berkuasa Tempatan

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A (MPPP dan MPSP) dan lain-lain agensi penguatkuasaan undang-undang yang berkaitan. Hubungan kerjasama ini adalah untuk melancarkan dan memudahkan proses penguatkuasaan undang-undang dalam usaha mengurangkan kadar jenayah’.

B [60] The learned judge found that based on the first respondent’s affidavit in reply, the first respondent had taken into consideration relevant facts before satisfying himself that PPS is being used for purposes prejudicial to public order (*rekod rayuan Jld 1 Bhgn A and B*: at p 66–67).

C [61] Contrary to the finding of the learned judge, there were no facts or evidence in the first respondent’s affidavit in reply to support the first respondent’s decision to declare PPS unlawful on the ground that PPS is being used for purposes prejudicial to public order. This begs the question: in issuing the impugned order, did the first respondent act purely on the altercation between one or two members of PPS and a member of the public or did the first respondent act on MCA’s call to ban the PPS? Bereft of any evidence relating to ‘purposes prejudicial to public order’ we reckoned that the first respondent’s decision was without any basis and hence, found no necessity to consider the ground raised by the appellant regarding the right to be heard. Save to say that the first respondent’s reliance on his understanding of his powers under s 5(1) of the Societies Act is erroneous and misplaced. For the reasons already discussed, the right to be heard must be accorded and a failure to do so offends the fundamental rules of natural justice.

F
CONCLUSION

G [62] To conclude, given the fact that between 2011–2014 PDRM and other government agencies were visibly engaged in various meetings and activities of PPS and given the absence of any other evidence to show that PPS had carried out activities prejudicial to public order, we found the impugned order unreasonable and irrational. In our judgment, the order was made not according to rules of reason and justice and was arbitrary and vague. We refer to *Susannah Sharp v Wakefield and others* [1891] AC 173 where Lord Halsbury LC said at p 179:

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‘discretion’ means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: ... according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself: ...

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[63] The appeal was therefore allowed and the order of the High Court set aside. We granted order in terms of prayers (1) (as amended), (2), (3) and (5) of the application with no order as to costs.

Appeal allowed, decision of High Court set aside.

Reported by Ashok Kumar

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